REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS APPLICATION 243 OF 2010

IN THE MATTER OF AN APPLICATION BY KING BIRD (KENYA) LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDER OF CERTIORARI AGAINST KENYA REVENUE AUTHORITY, COMMISSIONER OF CUSTOMS AND EXCISE, KENYA REVENUE AUTHORITY AND THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY.

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA REVENUE AUTHORITY.....1ST RESPONDENT

COMMISSIONER OF CUSTOMS & EXCISE KENYA REVENUE AUTHORITY...2ND RESPONDENT

COMMISSIONER GENERAL KENYA REVENUE AUTHORITY.....3RD RESPONDENT

EX-PARTE.....KING BIRD (KENYA) LIMITED

JUDGEMENT

King Bird (Kenya) Limited the Ex-parte Applicant herein is a company registered in Kenya trading in motor cycles among other goods. Kenya Revenue Authority, Commissioner of Customs & Excise, and Commissioner General of Kenya Revenue Authority are the 1st to 3rd respondents respectively. The respondents are among other things responsible for collection of revenue. According to the Applicant, in the month of April, 2010 the Applicant purchased 487 motor cycles from a company based in China and brought them to Kenya in three batches. As is the norm the Applicant declared the value of the goods for tax purposes through a clearing agent. The Applicant paid the tax due promptly but before the goods were released the respondents' officers appraised the goods and informed the Applicant through its agent that extra duty of Kshs.844,066.00 was payable. The Applicant paid this amount but the goods were not released. Instead the Applicant was informed by its agent that an extra duty of kshs.1,595,207.00 was required. The Applicant again paid this extra duty but the respondents still did not release the goods. Instead the respondents made another demand for extra duty. That is when the Applicant came to this court and obtained leave to commence judicial review proceedings. Through a notice of motion dated 9th August, 2010 the Applicant therefore seeks:-

"AN ORDER OF CERTIORARI to remove to this Honourable Court to be quashed the decision of the Respondents to detain the Applicant's imported goods consisting of motor cycles imported under Bills of Lading Nos.551075844, 551075741,801882681, Customs Entry Numbers 2010MSA2298515,2010MSA2295870,2010MSA2297312."

The application is supported by grounds on its face, a verifying affidavit sworn on 12th July, 2010 by Wang Xiang the General Manager of the Applicant Company, a statutory statement dated 13th July, 2010, a supplementary affidavit sworn by the said Wang Xiang on 22nd March, 2011 and annexures to the affidavits. The respondents opposed the application through the replying affidavit sworn by Seraphine Anamanjia on 22nd February, 2011.

When this matter came up before Gacheche, J on 22nd February, 2010 the motor cycles in question were by consent released to the Applicant after the Applicant agreed to provide security by way of bank guarantee in the sum of ksh.2,966,078 being the outstanding figure.

The respondents' case as brought out in the replying affidavit of Seraphine Anamanjia is that for the first batch of 170 motor cycles the Applicant's agent (Morevo Agency) declared the Freight on Board (FOB) value or the value of each of the 60 motor cycles of 125cc for purposes of customs value at US$250.00 and the total duty payable was Kshs.321,060.00. For each of the 110 motor cycles of 150cc the FOB value for purposes of customs valuation was declared at US$280.00 and the total duty payable was Kshs.659,230.00. The total duty payable for the first batch of 170 motor cycles was therefore Kshs.1,384,202.00 and this amount was indeed paid by the Applicant's agent.

In respect of the second batch of motor cycles the Applicant declared the FOB value for 125cc and 150cc motor cycles at US$250.00 and US$280.00 respectively and the total taxes paid for the second batch was Kshs.1,365,338.00. This second batch was made up of 60 motor cycles of 125cc and 110 motor cycles of 150cc. As for the third batch the Applicant declared FOB value for a 125cc motor cycle as US$250.00 and that of a 150cc as US$280.00 and paid total taxes of Kshs.1,221,828.00. The third batch of motor cycles was made up of 22 motor cycles and 125 motor cycles of 125cc and 150cc ratings respectively.

It is the respondents' case that after inspection and verification in respect of all the three batches of imports it was discovered that the Applicant had under declared the value of the motor cycles. The respondents concluded that the FOB value of a 125cc motor cycle was US$420 and that of a 150cc motor cycle was US$470.00.

The 2nd respondent then made decisions to the effect that in respect of the first batch a fine of kshs.750,000.00 and extra duty of Kshs.392,075.00 was to be imposed. For the second batch of motor cycles a fine of Kshs.750,000.00 was imposed and extra duty of kshs.408,215.00 was to be paid. As concerns the third batch a fine of kshs.650,000.00 and extra duty of Kshs.375,788.00 was to be paid by the Applicant. The Applicant was informed accordingly. The extra duty and fine the Applicant was asked to pay was Kshs.1,176,078.00 and Kshs.2,150,000.00 respectively making a grand total of Kshs.3,326,078.00. Seraphine Anamanjia averred at paragraph 45 of her affidavit as follows:-

"THAT the said amount of Kshs.3,326,078.00 being demanded from the Ex-parte Applicant has not been paid."

It is the respondents' case that the decision to upgrade the FOB value of the 125cc and 150cc motor cycles from US$250 and US$280 respectively to US$420 and US$470 was based on the FOB value of similar motor cycles imported from the same country of origin namely China.

It is the respondents' case that the imposition of fines on the Applicant was done in accordance with Section 201 of the East African Community Customs Management Act (EACCMA), 2004 since the Applicant had committed the offences created by Section 203 of the same Act.

The respondents through paragraph 56 of the replying affidavit denied that the Applicant had through its agent (Morevo Agency) paid Kshs.2,443,273.00 on top of Kshs.3,971,368.00 which had earlier been paid. The respondents further averred that those payments were in respect of different transactions not related to the imports in dispute in this case.

In his supplementary affidavit Mr. Wang Xiang the General Manager of the Applicant insisted that the

exhibits he had annexed to his verifying affidavit were for payments in respect of the imports in dispute. He denied committing any offences as alleged by the respondents. He insisted that he had paid Kshs.2,443,273.00 on top of the Kshs.3,971,368.00 which the respondents have admitted receiving.

It is the Applicant's case that the demand by the respondents is capricious and not based on any known law. The Applicant cites the respondents' claim of Kshs.3,326,078.00 at paragraph 62 of the replying affidavit and the claim for Kshs.2,966,078.00 made in court on 22nd July, 2010 to demonstrate the lack of consistency and good faith in the respondents' claim. The Applicant also cites the constantly changing amounts claimed by the respondents to demonstrate that the respondents are acting maliciously.

Considering the arguments made by the parties in this case, I find that the general issue for the determination of this court is whether the respondents acted fairly and within the law in assessing the taxes payable by the Applicant.

I will start by looking at the fines. In paragraph 62 of the replying affidavit the respondents indicate that they are demanding Kshs.3,326,078.00 being fine and extra duty. Out of this amount Kshs.2,150,000.00 is fine and Kshs.1,176,078.00 is extra duty. The respondents say that the fine was imposed in accordance with Section 201 of EACCMA. Section 201 provides that:-

"Where on conviction for an offence under this Act, a person is liable to pay a fine, that person shall unless the goods are prohibited goods or are ordered to be forfeited under this Act, pay duty on the goods in addition to the fine."

For a fine to be imposed under Section 201 there has to be a conviction. The respondents did not present to the court any conviction. The respondents also submitted that the Applicant made false or incorrect entries and made false declarations thereby contravening Section 203 of EACCMA. There is however no evidence that the Applicant committed any of the crimes specified in the said Section. In fact the claim by the respondents that the Applicant has breached the provisions of Section 203 without any evidence to support such claim only goes to prove that the respondents are acting in bad faith, unreasonably and maliciously.

I am at a loss as to why the respondents decided to impose fines on the Applicant without any clear legal basis. The only conclusion is to agree with the Applicant that the fines were an afterthought and were meant to cover up the inefficiencies of the respondents. The respondents acted in excess of their jurisdiction by imposing those fines. Their actions bring the Applicant's case into the judicial review arena and the solution is to quash the fines that were imposed without any legal basis.

What remains to be considered is the amount of Kshs1,176,078.00 being the extra duty. It is not in dispute that the respondents are allowed by the law to determine the value of imported goods. The respondents are also allowed by the law to impose the correct taxes upon determining the value of the imported goods. The Applicant cannot therefore question the fact that the respondents determined that the FOB Value of a 125cc motor cycle was US$420 instead of US$250 as declared by the Applicant. The Applicant cannot also be allowed to question through these proceedings the respondents' determination that a motor cycle with 150cc rating had a FOB value of US$470 and not US$250 as declared by the Applicant. The Applicant is however entitled to challenge the circumstances surrounding the assessment so as to convince the court that it was not subjected to a fair process.

In the replying affidavit the respondents claim Kshs.3,326,078.00 as the fine and extra duty due. When the matter came to court counsel for the respondents asked for a bank guarantee of Kshs.2,966,079 and indicated to the court that this was the outstanding amount. The Applicant claims it paid a total of Kshs6,414,641.00. The respondents say they only received Kshs.3,971,368.00 from the Applicant. This court will for the purposes of this judgement go by the figures provided by the respondents as to the amount paid by the Applicant. The respondents have not however explained how the figure they are claiming dropped from Kshs.3,326,078.00 as indicated in the replying affidavit to Kshs.2,966,079.00 as indicated in court by their counsel. The respondents have not explained when Kshs.360,289.00 being the difference between the figure in the replying affidavit and the amount asked for by their advocate in court

was paid.

Without a reasonable explanation being given on the different figures, the only conclusion is that the respondents do not know what is due from the Applicant. What the respondents are doing amounts to plucking figures from the air and inserting them in their documents. Their alleged assessment of extra duty due from the Applicant has not been done in accordance with the law. The Applicant is therefore correct when it claims that the respondents have acted unfairly towards it. With the kind of evidence presented to the court by the respondents the court is not in a position to tell the amount of extra duty the Applicant is supposed to pay and the only logical conclusion is that the Applicant has paid whatever it was supposed to pay to the respondents. A citizen of this country ought to know the correct amount of taxes due to the taxman. From the facts presented in court, I am persuaded to conclude that the respondents have abused their powers in this case. I will reiterate what J. G. Nyamu, J (as he then was) told the respondents at page 60 of his judgement in the case of **KEROCHE INDUSTRIES LIMITED v KENYA REVENUE AUTHORITY & 5 others [2007] eKLR** as follows:-

"Abuse of power in my view poisons the entire tree as rightly put by the learned counsel for the Applicant Mr Orengo. My finding on this is that where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if that power did not exist in respect of the special circumstances where the abuse was perpetrated. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same are abused by decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of discretion. A court of law should never sanction abuse of power, whether arising from statute or discretion."

Justice J. G. Nyamu appears to have been speaking to the facts of this case. In this case the respondents have not only gone ahead to impose unwarranted fines but they have also imposed contradictory extra duties. Their actions reek of abuse of power and this court cannot allow them to get away with it.

The motor cycles have already been released to the Applicant. There is therefore no need to grant the relief sought. It is however clear that this court would have directed the release of the motor cycles since the Applicant had no outstanding obligations to the respondents. The reasonable thing to do is therefore to direct the discharge of the bank guarantee in the sum of Kshs.2,966,079 provided by the Applicant so as to secure the release of its motor cycles by the respondents. I therefore order the discharge of the said bank guarantee. The Applicant has unjustly suffered in the hands of the respondents and it shall have costs from the respondents.

Dated and signed at Nairobi this 27th day of March , 2012 .

W.K. KORIR
JUDGE